NO. 80532-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RENTAL HOUSING ASSOCIATION OF PUGET SOUND,

Appellant,

v.

CITY OF DES MOINES, a Washington municipal corporation,

Respondent.

BRIEF OF AMICUS CURIAE, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

Amicus, the Washington State Association of Municipal Attorneys (WSAMA), join in and fully support the arguments raised by the Respondent, the City of Des Moines.

II. STATEMENT OF THE CASE

WSAMA incorporates by reference the statement of facts included in the Respondent's Brief. In addition, the following timeline of key events may be helpful to the Court:

- July 20, 2005. The Appellant, through attorney Michael Witek ("an experienced attorney in matters of public records requests"[1]), makes its first request for records from the City of Des Moines.[2]
- August 17, 2005. The City provides several hundred pages of documents with a letter stating, "We are not providing a number of documents . . . that are exempt from public disclosure."[3]

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[1] CP 2289.

[2] CP 48.

[3] CP 53.

- October 7, 2005. Attorney Witek sends a letter threatening to sue the City, stating that the documents withheld "clearly would not fall under any of the PDA's exemptions."[4]
- January 25, 2006. Attorney Witek sends a letter "demand[ing] immediate production of documents" and making a "separate PDA request for more recent documents." This letter concedes that in its August 17, 2005 letter, the City "generally claim[ed] [documents] to be exempt."[5]
- February 2, 2006. Attorney Witek sends a letter accusing the City of violating the Public Records Act and threatening to bring legal proceedings to "compel a proper response."[6]
- February/March 2006. The City answers the "separate" request in installments, providing some duplicates of documents already given to the Appellant, but no new documents responsive to the July 2005 request.
- April 14, 2006. The City provides a "privilege log" of all documents withheld.[7]

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[4] CP 60.

[5] CP 65.

- June 20, 2006. The City Attorney and Attorney Witek have e-mail and verbal discussions about a potential lawsuit. The City Attorney, clearly anticipating that a lawsuit will be filed soon, asks Attorney Witek not to set a show cause hearing during or immediately after her early July vacation.[8]
- July 21, 2006 through mid-January, 2007. No negotiation occurs, and no correspondence is exchanged, between Attorney Witek and the City Attorney. The August 17, 2006 anniversary of the City's claim of exemption comes and goes, with no lawsuit filed.
- January 16, 2007. Lawsuit filed.

III. ARGUMENT

A. The Legislature's intent, apparent from the face of the statute, was to commence the statutory period "within one year of the agency's claim of exemption."

RCW 42.26.550(6) was added to the Public Records Act (PRA) in 2005, to state: "Actions under this section must be filed *within one year of the agency's claim of exemption* or the last production of a record on a partial or installment basis." (Emphasis supplied.) It is undisputed that the City of

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[6] CP 74.

[7] CP 80.

Des Moines sent the Appellant a letter claiming that certain records were exempt on August 17, 2005.[9] The Appellant's attorney acknowledged this fact.

Last December, this Court decided *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007), and used ordinary tools of statutory construction to give effect to the plain meaning of a statute:

> A court's objective in construing a statute is to determine the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* at 9-12. An undefined statutory term should be given its usual and ordinary meaning. *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). Statutory provisions and rules should be harmonized whenever possible. *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

Christensen, 162 Wn.2d at 372-73. As with the three day notice provision in unlawful detainer actions discussed in that case, here the meaning of RCW

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[8] CP 2121.

[9] CP 53.

42.56.550(6) is "plain on its face." A public records requester has one year from the time of a claim of exemption within which to file a lawsuit, if the requester believes the exemption was claimed in error. After that year has passed, the lawsuit is barred.

While Appellant invites this Court to engage in a wide variety of metaphysical musings about this statute, its meaning is plain on its face. Indeed, there is no other date than the date on which the exemption is claimed that can reasonably be tied to the language of the statute. For example, for the statute to start running on the date the municipality provided a response to a query about an exemption log, the very clear statutory language would have to be tortured like this (words in brackets signify addition by Appellant's construction):

> Actions under this section must be filed within one year of the agency's claim of exemption [*or the date on which such agency responds to an inquiry about its claim of exemption*] or the last production of a record on a partial or installment basis.

Appellant's proffered construction of RCW 42.56.550(6) would thus defeat the evident intention of the Legislature by providing a "floating" starting date a requester could delay for many months, simply by asking more questions about the agency's claim of exemption.

As the statute is written, a municipality faced with a public records request may claim an applicable exemption, and the requester has one year from the date of the "agency's claim of exemption" to bring an action if he or she disagrees with the exemption. Thereafter, if no lawsuit is filed, the municipality may close its books on the request. The purpose of a statute of limitations, to provide finality, could only be served by a plain meaning construction of RCW 42.56.550(6).[10]

Accordingly, Amicus WSAMA respectfully requests this Court to give effect to the evident intention of the legislature to start the one-year period on the date of the "claim of exemption," and not some highly mobile later date dependent upon communications between the requester and the municipality.

B. Even if the one-year statute could hypothetically be subject to equitable tolling, there are no facts that justify tolling in this case.

In order for a response to an inquiry to give rise to estoppel, the agency's conduct must have "fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired." *Del Guzzi Construction Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986). Where a defendant does nothing to

[10] *See Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007).

induce a prospective plaintiff not to bring a lawsuit, estoppel does not apply to prohibit application of the statute of limitations. *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 443 P.2d 544 (1968).

Here, as in *Central Heat* and *Del Guzzi*, Appellant had plenty of information in plenty of time to bring an action within the one-year limitations period provided by RCW 42.56.550(6). That Appellant did not do so is not attributable to any inequitable conduct by Des Moines, as far as this record shows. To the contrary, Des Moines acted responsibly and within the bounds of the law at all times.

For example, it is quite striking to note that between June 2006 and January 2007, when the lawsuit was filed, the requester's attorney made no further efforts to negotiate with the City Attorney over the request, even though August 17, 2006 marked the one-year anniversary of the claim of exemption. The City is most certainly not responsible for the six months of silence in which the Appellant let the statute of limitations expire and then attempted to file the lawsuit late.

C. The Appellant's interpretation is inconsistent with public agencies' duty to provide "the fullest assistance" to those who request public records.

As noted, in adopting RCW 42.56.550(6) in 2005, the Legislature clearly intended to establish a one-year statute of limitations, which would

commence to run on a date certain. Furthermore, the shortening of the limitations period was in reaction to this Court's decision in *Yousoufian v. Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004), which interpreted the statute to disallow any reprieve in monetary penalties when requesters unreasonably delay filing suit. Shortening the limitations period was the Legislature's way of protecting public agencies against staggering fee awards in public records cases.

But the Legislature simultaneously maintained the requirement that public agencies provide the "fullest assistance to inquirers." RCW 42.56.100. Interpreting the statute of limitations to impose an open-ended period in which to sue—subject to re-starting every time a public agency corresponded or spoke with a requester—is at odds with the duty to provide "the fullest assistance." It is natural for an agency subject to the broadly-worded mandate of "the fullest assistance" to respond to continuing inquiries and attempt to negotiate with requesters. Responding to requesters is not only polite, but consistent with the "fullest assistance" obligation, which exists in the spirit of the PDA when not within its literal terms.[11]

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[11] Literally, RCW 42.56.100 applies only to agency rules. However, the statute (or its predecessor, Chapter 42.17 RCW) have been cited in other contexts.

No one would dispute that public agencies should be encouraged to negotiate and correspond with those requesting public records, rather than stone-walling requesters out of a fear that the statute of limitations will be re-started. Yet, interpreting the statute of limitations in the manner the Appellant advocates would chill such negotiation and discussion, because public agencies would fear prolonging the potential period in which lawsuits could be brought and fines accrue.

In this case, the City fully discharged its duty to provide "the fullest assistance" to the Appellant. While the parties did not initially agree on what was exempt and what was not, the City did not engage in any stonewalling or evasive tactics. Its attorney dealt with the requester's attorney in a professional manner, responding to his continuing challenges and concerns. Characterizing the City's efforts to communicate and negotiate as actions that delay accrual of the claim and "restart" the statute of limitations would punish the City for negotiating. This is most certainly not the result the Legislature intended in requiring "the fullest assistance" to be provided.

D. The Appellant's argument that enforcing a one-year statute of imitations would stifle judicial review rings hollow; the PRA

Spokane Research & Defense Fund v. West Central Community Development Ass'n, 133 Wn. App. 602, 137 P.3d 120 (2006).

contains ample protection, and incentive, for judicial review, independent of the statute of limitations.

The Appellant's Briefs are replete with doomsday predictions that enforcing the one-year statute of limitations the Legislature clearly intended would improperly discourage judicial review of public records actions. These arguments have no merit. Even with a one-year statute of limitations, the PRA amply protects, and encourages, requesters to seek relief from denials of public records.

Requesters are free to file a lawsuit against any public agency who has denied records at any time during the one-year period following denial, and the public agency has the burden of proving that the denial was proper. RCW 42.56.550(1), (4). As an added incentive to file suit, requesters may have their attorney fees and costs reimbursed if they prevail. RCW 42.56.550(4). Moreover, during the course of the lawsuit, judges may conduct in camera review of records to see if they are truly exempt. RCW 42.56.550(3). Finally, the PRA imposes stiff penalties on public agencies who improperly withhold records, in the form of fines of up to $100.00 per day for each day of withholding. RCW 42.56.550(4).[12] Truly, this Amicus is

[12] In addition, as an alternative to suing, requesters of State records can obtain review of an agency denial from the Attorney General. RCW 42.56.530.

hard-pressed to find a state statute that is more protective of a citizen's right to sue than is the PRA.

But the major point the Appellant misses is that under the PRA, the very contents of an agency's response are subject to review by the court. *See, e.g., Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 271, 884 P.2d 592 (1995) (requiring "all relevant records or portions be identified with particularity"). Because the court can review the adequacy and sufficiency of a denial letter or claim of exemption, it makes no sense to consider content when determining when a claim accrues.

Appellant's argument is analogous to saying that a tort action doesn't accrue (and is "tolled") during the period of correspondence between plaintiff and defendant over fault or extent of damages. This is not the law; while a "discovery" rule attaches to tort statutes of limitations and not here, appellant "discovered" Des Moines' claim of exemption on August 17, 2005, when Des Moines told appellant it was claiming an exemption. Fundamentally, it is the job of any plaintiff's attorney to keep his or her eye on the statute of limitations during any pre-filing period of negotiation, whether the case arises in tort or under the PRA.

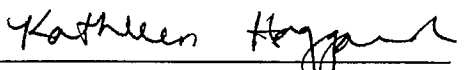
Appellant also fails to recognize that the interpretation it advocates will have the paradoxical result of chilling judicial review of PRA cases. The

flip side of Appellant's argument—that a claim under the public records act does not "accrue," and the one-year statute of limitations begin to run, until the requester receives a flawless "claim of exemption" and a privilege log—would render the superior courts unable to hear many public records cases. Any requester who received a claim of exemption he or she perceived to be inadequate could no longer sue in the trial court, because his or her claim would not yet have accrued and would therefore not be ripe. As a result, public agencies could escape review under the PRA simply by never providing an "adequate" claim of exemption or a *PAWS* index. This result is most certainly not what the Legislature intended in enacting any portion of RCW 42.56.550.

IV. CONCLUSION

For the reasons stated above, WSAMA respectfully requests that this Court affirm the decision of the trial court, finding that the statute of limitations has run on the Appellants claim.

RESPECTFULLY SUBMITTED this 4th day of April, 2008.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent *via Email* the Motion for Leave to File Brief of Amicus Curiae, Washington State Association of Municipal Attorneys, in Support of Respondent; and Brief of Amicus Curiae, Washington State Association of Municipal Attorneys, in Support of Respondent, to the following:

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